

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

NO. 75-4232

United States Court of Appeals FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MERCY COLLEGE,
Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

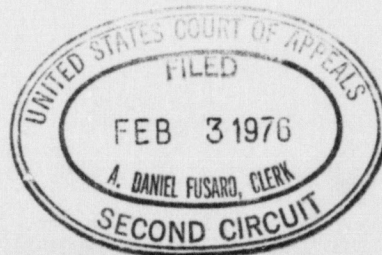
BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

ELLIOTT MOORE,
Deputy Associate General Counsel,

DAVID F. ZORENSKY,
Attorney,

National Labor Relations Board.
Washington, D.C. 20570

JOHN S. IRVING,
General Counsel,
National Labor Relations Board.



(i)

INDEX

	<u>Page</u>
STATEMENT OF THE ISSUE PRESENTED	1
STATEMENT OF THE CASE	1
I. The Board's findings of fact	2
A. The representation proceedings	2
1. Pre-election determinations	2
2. The post-election ruling	5
a. The challenged ballot of Neil Judge	5
b. The objection to the Union's handbill	6
3. Board disposition of the requests for review	8
4. Certification of the Union	9
B. The unfair labor practice proceeding	9
1. The Employer refuses to bargain with the Union	9
2. The Board responds to the Employer's demand for agency documents	10
II. The Board's decision and order	11
ARGUMENT	12
The Board did not abuse its discretion when it certified the Union and found that the Employer violated Section 8(a)(5) and (1) of the Act	12
A. Introduction	12
B. The Board did not abuse its discretion in overruling the Employer's objections to the election	12
1. Neil Judge was an eligible voter	13

(ii)

	<u>Page</u>
a. Judge was properly included in the unit	13
b. The Board properly found that Judge was not a supervisor	15
c. Judge was not a managerial employee	17
2. The Union handbill did not contain a material misrepre- sentation of fact	20
3. The Union's name was not incorrect or misleading	22
C. The Employer was not denied procedural due process	25
1. The Board's rulings in the representation proceeding did not violate the quorum requirement of the Act	25
2. The Board properly overruled the Employer's post-election objections without a hearing	26
3. The Board properly granted the motion for summary judgment and denied the Employer's motion for reconsideration	28
CONCLUSION	32

AUTHORITIES CITED

Cases:

Adelphi University, 195 NLRB 639 (1972)	14, 16, 18, 19
Allis Chalmers Mfg. Co., 62 NLRB 995 (1945)	25
Alto Plastics Mfg. Corp., 136 NLRB 850 (1962)	24
Amalgamated Local Union 355 v. N.L.R.B., 481 F.2d 996 (C.A. 2, 1973), cert. den., 414 U.S. 1062	15
Banburg Fashions, Inc., 179 NLRB 447 (1969)	24

	<u>Page</u>
Bausch & Lomb, Inc. v. N.L.R.B., 451 F.2d 873 (C.A. 2, 1971)	21
Berea Publishing Co., 140 NLRB 516 (1963)	13
Butler Mfg. Co., 167 NLRB 308 (1967)	24-25
Clement-Blythe Cos., 182 NLRB 502 (1970), enf'd p.c. 77 LRRM 2373 (C.A. 4, 1971)	31
C.W. Post Center of Long Island University, 189 NLRB 904 (1971)	18
Dubin-Haskell Lining Corp. v. N.L.R.B., 375 F.2d 568 (C.A. 4, 1967), cert. den., 393 U.S. 824	16
Eastern Camera & Photo Corp., 140 NLRB 569 (1963)	18
Florida Southern College, 196 NLRB 888 (1972)	14
Fordham University, 193 NLRB 134 (1971)	18
Fordham University, 214 NLRB 137, 87 LRRM 1643 (1974)	16
Franks Bros. Co. v. N.L.R.B., 321 U.S.702 (1944)	30
Guardian Container Co., 174 NLRB 34 (1969)	24
Hanna Mining Co. v. Marine Engineers, 382 U.S. 181 (1965)	15
Henderson Trumbull Supply Corp. v. N.L.R.B., 501 F.2d 1224 (C.A. 2, 1974)	20

	<u>Page</u>
Hollywood Ceramics Co., 140 NLRB 221 (1962)	20, 21, 22
International Harvester Co., Wis. Steel Works, 145 NLRB 1747 (1964)	24
KFC National Management Co., 214 NLRB 29, 87 LRRM 1685 (1974)	30
KFC Nat'l Mgmt. Corp. v. N.L.R.B., 497 F.2d 298 (C.A. 2, 1974)	4, 25
Linn v. United Plant Guard Workers, 383 U.S. 53 (1966)	20
Lipman Motors v. N.L.R.B., 451 F.2d 823 (C.A. 2, 1971)	27
Magnesium Casting Co. v. N.L.R.B., 401 U.S. 137 (1971)	12, 28
Manhattan College, 195 NLRB 65 (1972)	14
Marine Engineers v. Interlake Steamship Co., 370 U.S. 173 (1962)	15, 16
Massey Ferguson, Inc., 184 NLRB 640 (1970), enf'd 78 LRRM 2289 (C.A. 7, 1971)	30
Metal Blast, Inc. v. N.L.R.B., 324 F.2d 602 (C.A. 6, 1963)	29
Minneapolis Knitting Works, 84 NLRB 826 (1949)	24
Modine Mfg. Co., 203 NLRB 527 (1973), enf'd, 500 F.2d 914 (C.A. 8, 1974)	21
N.L.R.B. v. Bell Aerospace Co., 416 U.S. 267 (1974), aff'd in pt. 475 F.2d 485 (C.A. 2, 1973)	17, 18

	<u>Page</u>
N.L.R.B. v. Broyhill Co., ___ F.2d ___ (C.A. 8, 1975), 98 LRRM 2109	31
N.L.R.B. v. City Yellow Cab, 344 F.2d 575 (C.A. 6, 1965)	16
N.L.R.B. v. Erie Resistor Corp., 373 U.S. 221 (1963)	15
N.L.R.B. v. Horn & Hardart Co., 439 F.2d 674 (C.A. 2, 1971)	28
N.L.R.B. v. Joclin Mfg. Co., 314 F.2d 627 (C.A. 2, 1963)	27
N.L.R.B. v. Katz, 369 U.S. 736 (1962)	30, 31
N.L.R.B. v. Lorrillard, P., Co., 314 U.S. 512 (1942)	30
N.L.R.B. v. Mattison Machine Works, 365 U.S. 123 (1961)	23
N.L.R.B. v. Modine Mfg. Co., 500 F.2d 914 (C.A. 8, 1974)	28
N.L.R.B. v. Olson Bodies, Inc., 420 F.2d 1187 (C.A. 2, 1970), cert. den., 401 U.S. 954	12, 28
N.L.R.B. v. Patent Trader, Inc., 426 F.2d 791 (C.A. 2, 1970)	30
N.L.R.B. v. Southern Health Corp., 514 F.2d 1121 (C.A. 7, 1975)	28
N.L.R.B. v. Swift & Co., 240 F.2d 65 (C.A. 9, 1957)	16
N.L.R.B. v. Swift & Co., 292 F.2d 561 (C.A. 1, 1961)	15

(vi)

	<u>Page</u>
N.L.R.B. v. Tennessee Packers, Inc., 379 F.2d 172 (C.A. 6, 1967), cert. den., 389 U.S. 958	28
N.L.R.B. v. Tower, A.J., Co., 329 U.S. 324 (1946)	12
N.L.R.B. v. Visual Educom, Inc., 486 F.2d 639 (C.A. 7, 1973)	28
N.L.R.B. v. Walker, O.S., Co. Inc., 469 F.2d 813 (C.A. 1, 1972)	28
N.L.R.B. v. Westworth Institute, 514 F.2d 550 (C.A. 1, 1975)	19
N.L.R.B. v. Yate Mfg. Co., 356 F.2d 69 (C.A. 1, 1966)	29
New York University, 205 NLRB 4 (1973)	14, 16, 17, 18
Pepsi-Cola Bottling Co. v. N.L.R.B., 409 F.2d 676 (C.A. 2, 1969), cert. den., 396 U.S. 904	29
Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146 (1941)	28
Polymers Inc. v. N.L.R.B., 414 F.2d 999 (C.A. 2, 1969), cert. den., 396 U.S. 1010	12, 27, 28
Precision Fabricators v. N.L.R.B., 204 F.2d 567 (C.A. 2, 1953)	16
Radio Corp. of America, 89 NLRB 699 (1050)	24
Red Star Express Lines v. N.L.R.B., 196 F.2d 78 (C.A. 2, 1952)	13

(vii)

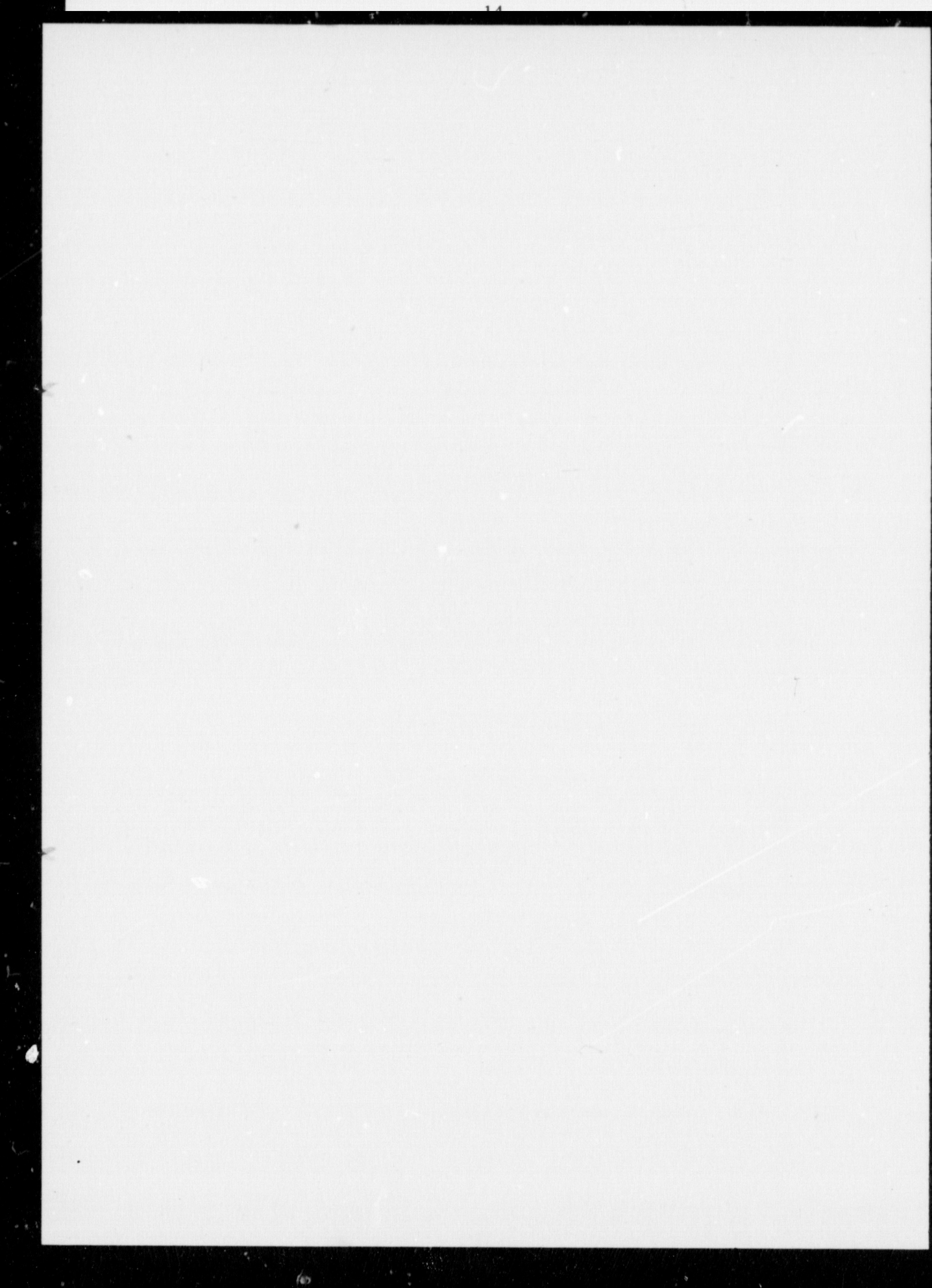
	<u>Page</u>
Renmuth, Inc., 195 NLRB 325 (1972), Enf'd 470 F.2d 997 (C.A. 6, 1972)	31
Schmerler Ford v. N.L.R.B., 424 F.2d 1335 (C.A. 7, 1970), cert. den., 400 U.S. 823	23
Stewart-Warner Corp., 102 NLRB 1153 (1953)	20
Tusculum College, 199 NLRB 28 (1972)	18, 19
Westinghouse Elec. Corp. v. N.L.R.B., 424 F.2d 1151 (C.A. 7, 1970), cert. den., 400 U.S. 831, aff'g 163 NLRB 723 (1967)	16
William Burns Int'l Detective Agency, 138 NLRB 449 (1962)	24

Statutes:

Freedom of Information Act (5 U.S.C. § 552)	10, 11
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, <i>et seq.</i>)	2
Section 2(5)	23
Section 2(11)	15, 16
Section 3(b)	25
Section 8(a)(1)	2, 9, 11, 12
Section 8(a)(5)	2, 9, 11, 12, 28
Section 9	2
Section 9(b)(3)	24
Section 9(c)	2, 26
Section 9(d)	2
Section 10(c)	1

Miscellaneous:

N.L.R.B. Rules & Regulations (Series 8, as amended, (29 C.F.R.), Section 102.48(d), 102.48(d)(2), 102.60(b), 102.61(d)(e), 102.67(f), 102.69, 102.69(c))	5, 25, 26, 27, 28, 29, 30
--	---------------------------



15

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 75-4232

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MERCY COLLEGE,
Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE ISSUE PRESENTED

Whether the Board properly found that the Employer violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the duly certified representative of its employees.

STATEMENT OF THE CASE

This case is before the Court upon application of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations

Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*). The Board seeks enforcement of its order issued on July 11, 1975, against Mercy College (hereinafter the "Employer"). The Board's Decision by Members Fanning, Kennedy, and Penello (A. 186-197)¹ is reported at 219 NLRB No. 5. This Court has jurisdiction of the proceedings, for the unfair labor practice occurred at Dobbs Ferry, New York, where the Employer maintains a private, non-profit college.

1. THE BOARD'S FINDINGS OF FACT

The Board found that the Employer violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union, which had been certified by the Board as the exclusive bargaining representative of the employees in an appropriate unit, following the representation proceedings described below.

A. The Representation Proceedings

1. Pre-election determinations

On May 17, 1973, the Mercy College Faculty Council (hereinafter the "Union") filed a petition for certification, pursuant to Section 9(c) of the Act (A. 4). In response to this petition, the Employer alleged, *inter alia*, that the name by which the Union designated itself was incorrect and

¹ "A." references are to the printed record. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence. As the Board's order is based in part on findings made in a representation proceeding under Section 9 of the Act (Board Case 2-RC-16181), reported in part at 212 NLRB No. 134) the record in that proceeding is before the Court pursuant to Section 9(d) of the Act.

misleading. For that reason, the Employer refused to stipulate that the Union was a labor organization within the meaning of the Act. According to the Employer, the correct name of the Union and the one by which it should be designated on the ballot was "Mercy College Faculty Council (Affiliation Pending NYSUT-NEA/AFT-AFL-CIO)",² and the Employer sought correction on the grounds that the Union was a "front" for NYSUT. (A. 62-63; 6, 7-8).

At hearings held on June 7 and June 15, 1973, the Employer pointed out that on May 4, 1973, an earlier petition (A. 58) had been filed in Board Case No. 2-RC-16168 by Bernard Koozman, a NYSUT field representative, naming the petitioner in the manner proposed by the Employer.³ Ann E. Grow, the president of the Union, and the only witness on this issue, testified that she had filed the Union's petition after Koozman's petition had been withdrawn (A. 63; 10, 42); that the Union had been organized in the summer of 1972, prior to and without assistance from NYSUT; that "Mercy College Faculty Council" was the name set forth on the Union's original by-laws; and that it had never had any other name (A. 64; 10-12, 23, 50). She also stated that the issue of affiliation had been discussed with the membership, that legal counsel in this representation proceeding was provided by an affiliate of NYSUT, but that the Union was not affiliating with any other labor organization at that time (A. 63-64; 12-14, 17-20, 20-21, 24-26, 28-30, 32, 33, 35-37, 43-44, 50).

Subsequently, the Acting Regional Director issued his Decision and Direction of Election on July 12, 1973 (A. 62-68). He found that the

² The letters stand for New York State United Teachers—National Educational Association/American Federation of Teachers—AFL-CIO, hereinafter referred to as NYSUT.

³ This petition was withdrawn on May 17, 1973 (A. 63; 42).

Union was a labor organization within the meaning of the Act and that its correct name was "Mercy College Faculty Council." He rejected the contention that the Union was a "front" for NYSUT merely because it sought and received assistance from that group in its efforts to receive recognition. Noting the independent formation and administration of the Union, he added that there was no substance to the contention that the Union's name was incorrect or misleading (A. 64-65).

Accordingly, he directed an election to be held in an agreed upon unit of all full time and regular part time members of the faculty, including department chairmen, assistant library director and reader services librarians, but excluding administrative personnel, the president, assistants to the president, deans and assistant deans, directors and assistant directors of academic advisors, director of the library, as well as all other employees, guards, watchmen and supervisors as defined by the Act (A. 65-68).

Upon the Employer's timely request for review of this decision as to the Union's name, the Board found that it "raises no issues wanting review," and denied the request on August 2, 1973 (A. 69). This decision was issued after consideration by one Board member and two staff assistants, but in light of this Court's decision in *KFC National Management Corporation v. N.L.R.B.*, 497 F.2d 298 (C.A. 2, 1974), a panel of three Board members again reviewed and denied this request for review, "*nunc pro tunc*," on March 12, 1975 (A. 159, 161-164, 189). This second review was held because the Board's records did not affirmatively establish that a full Board panel had ratified the first decision as required to satisfy the quorum requirements of the Act and to avoid the "procedural infirmity" pointed out in the *KFC* case (A. 161-164; 189).

2. The post-election ruling

A secret ballot election was held on November 7 and 8, 1973 in which 42 votes were cast for the Union and 41 votes against it, with three ballots challenged (A. 70). In addition, both the Employer and the Union filed timely objections to the election (A. 96-100; 71-74). Pursuant to the Board's Rules and Regulations, Series 8, as amended, (29 C.F.R.) Section 102.69, the Regional Director caused an investigation to be made of the objections and the challenges. During this investigation the parties were afforded a full opportunity to submit evidences bearing upon the issues, and the Director also conducted an independent inquiry (A. 100). On March 7, 1974, he issued his Supplemental Decision; the relevant rulings are discussed below.

a. The challenged ballot of Neil Judge

The ballot of Neil Judge, the director of athletics at Mercy College, had been challenged by the Board agent at the election because his name was not on the list of eligible voters furnished by the Employer. The Employer supported the challenge, contending that Judge was ineligible to vote because he was either an "administrative" employee and/or a "supervisor" and, hence, excluded from the defined unit in the Decision and Direction of Election (A. 127).⁴

As a result of his investigation, the Regional Director found that Judge was a "multi-function employee," whose work was not primarily administrative (A. 131-132). He found that Judge spent the majority

⁴ "Administrative personnel" were excluded from the bargaining unit by agreement of the parties (A. 65-66), but there was no discussion or definition of the term on the record of the pre-election hearing (A. 126, n. 36; 130).

of his time in coaching and teaching, and further that he shared a substantial community of interest with the faculty. Concluding that Judge was not barred from the unit as an administrator, he noted also that Judge exercised no supervisory authority over unit employees and his supervisory responsibility over non-unit employees took up well below 50 percent of his working time. The Director, therefore, rejected the contention that Judge was to be excluded from the unit as a supervisor. (A. 127-132.)

b. The objection to the Union's handbill

The Employer alleged that a pre-election handbill distributed by the Union contained a material misrepresentation as to a statement made by the Middle States Association of Colleges and Secondary Schools (hereinafter, "Middle States"), the organization which granted and reviewed the accreditation of Mercy College (A. 73-74). The Union pamphlet had been distributed to the faculty on November 5 or 6, 1973 (A. 119). The pamphlet stated in relevant part (A. 119; 75):

Past experience at Mercy teaches us that it is very important that our faculty express itself collectively. In the last five years we have seen a complete turnover of students, of course, but also, three separate administrations and at least a 50% turnover of members of the Board of Trustees. It is the faculty that represents the stable element of continuity for Mercy.

Also, many of us remember that outside accrediting agencies, such as Middle States, have given us fair warning that unchecked administrative authority will lead to rash and arbitrary decision-making — "authoritarian" was their word.

Moreover, you may remember that we have tried the idea of a collegial Senate and it failed of support largely over the issue of its built in administrative veto power. We wonder if

we can really hope for any better results from the administration's new governance proposals unless there is united faculty support to insure that a reasonable distribution of authority will ensue.

The Employer argued that this was a material misrepresentation of the comments made by Middle States in a report submitted to the College in March 1968 (A. 119). The Employer argued that while the Middle States report had cautioned about the development of administrative autocracy, this was merely an "afterthought" (A. 120). The relevant portion of this report read (A. 119-120; 80):

Within the past year, by-laws, including definition of duties, have been developed for each faculty-administrative standing committee. Some committee members are elected by the faculty as a whole, but committees are advisory only to the appropriate administrative officer. The actual decisions thus rest with the administration. Mercy College does not yet have a faculty organized as a deliberative and legislative body with its own by-laws and control of educational policies and curriculum.

Since the current President and Dean for Academic Affairs operate by arriving at consensus, the faculty at Mercy do in fact have a strong voice in determining the educational program. However, should there be a change in administration, the way is open for autocracy.

We understand that you are fully aware of this danger and are moving toward some form of faculty government — possibly a senate. The type of government is entirely your own affair, but we suggest considering whether it would be simpler and just as effective for a faculty the size of Mercy's to act as a whole rather than through elected representatives. The present standing committees would under this plan report to the faculty.

As to the present committee structure, we are not entirely clear as to the differences in the responsibilities of the

Academic Delegates (Department Chairmen) and the Faculty Curriculum Committee. Unless this situation is clarified, you may have in fact two curriculum committees which could cause not only duplication of effort but conflict.

The Regional Director found that the Union handbill "did not constitute a departure from the truth" (A. 121). He held that the Union's statement, "whether a departure from the literal text or not, was not so consequential as to warrant setting aside the election" (A. 122).

3. Board Disposition of the Requests for Review

Thereafter, a timely request for review of the Regional Director's Supplemental Decision was made in regard to his rulings as to the Union handbill and the eligibility of Neil Judge. Raising an additional contention as to Judge, the Employer argued that he was also to be excluded from the bargaining unit because he was a managerial employee.⁵ The Employer also sought review of the Regional Director's finding, not material here, that the Board agent at the count had properly tabulated a disputed ballot as a "yes" vote (A. 135). In this request for review, the Employer repeated the contentions it had made to the Regional Director, arguing that the election should have been set aside or an evidentiary hearing held as to these three issues, namely, the Union handbill, the eligibility of Neil Judge, and the disputed ballot.⁶

On April 30, 1974, the Board granted the request for review in so far as it related to the disputed ballot, but denied review in all other aspects (A. 133, 135, 171-172). On May 6, 1974, the Employer sought

⁵ See Employer's Request for Review of April 5, 1974, pp. 9-14.

⁶ *Id.*, pp. 1-31.

reconsideration as to Neil Judge's eligibility, in light of the Supreme Court's decision in *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267 (1974), but the Board panel again rejected this request on May 13, 1974, noting that it contained nothing that had not been previously considered (A. 134, 171-172).

4. Certification of the Union

Subsequently, the Board issued its decision as to the disputed "yes" vote on August 16, 1974, in 212 NLRB No. 134, 87 LRRM 1116, and found the ballot to be void. The Board remanded the case to the Regional Director to open and count the ballot of Neil Judge and to issue an appropriate certification. (A. 137.) On August 26, 1974, the Regional Director issued a revised tally and on August 30, 1974, he certified the Mercy College Faculty Council as the exclusive statutory bargaining representative of the defined unit (A. 140, 141).⁷

B. The Unfair Labor Practice Proceeding

1. The Employer Refuses to Bargain with the Union

About September 5, 1974, the Union requested bargaining. Notwithstanding the Board certification, the Employer has refused to recognize and to bargain with the Union since September 25, 1974. (A. 142, 145-146, 149.) On December 24, 1974, the Union filed unfair labor practice charges with the Board, and on February 6, 1975, the Board issued a complaint, alleging that the Employer had violated Section 8(a)(5) and

⁷ The Union maintained its 42-41 margin in the election, because the acceptance of Judge's ballot offset the loss of the voided "yes" vote.

(1) of the Act (A. 142, 143-147). The Employer filed an answer on February 18, admitting its refusal to bargain with the Union (A. 148, 149), but contesting the validity of the election and the Union's certification (A. 148-151). The Employer asserted as affirmative defenses the same contentions as to the Judge vote and the Union handbill that had previously been rejected by the Board (A. 149-150). In addition, the Employer argued that the Board had violated the quorum requirements of the Act in its representation case determinations (A. 150). On March 19, 1975, the Employer amended its answer to assert as an additional defense the previously made claim that the Union had been allowed to call itself an incomplete and misleading name during the campaign and election (A. 152).

The General Counsel then filed a motion for summary judgment, and subsequently, on April 22, 1975, the Board issued an order transferring the proceeding to itself and a notice to show cause why the General Counsel's motion for summary judgment should not be granted (A. 174-176). The Employer thereafter filed a response to this notice, in which it reasserted the matters raised by its answer to the complaint, and argued that it was entitled to a hearing on all the issues raised, including the impact of the name used by the Faculty Council and the quorum requirement (A. 177-185).

2. The Board Responds to the Employer's Demand for Agency Documents.

In its statement in opposition to the petition for summary judgment, the Employer argued that the Board had breached the Freedom of Information Act (5 U.S.C. §552) by failing to provide it with certain documents to enable it to prepare its defense (A. 183). On January 13, 1975, the Employer had first made such a request, which was expanded in the letters that followed to include all documents, papers and records, including

agenda, memos and case summaries, relating to its requests for review (A. 153-154, 157-158, 159-160). By letters dated February 3 and March 14, 1975, the Board's Executive Secretary granted in part and denied in part these requests, basing this denial on the ground that the documents requested related to the deliberative processes of the Board and, thus, were not subject to disclosure (A. 155-156, 161-164). Thereafter, by a letter dated April 4, 1975, the Employer appealed the Executive Secretary's decision to the Chairman of the Board and again requested the documents (A. 165-168). By a letter dated May 2, 1975, Chairman Murphy provided certain of the requested documents and denied the requests as to the remainder, on the grounds that this material was exempted under the Freedom of Information Act and as part of the Board's deliberative processes (A. 169-172).

II. THE BOARD'S DECISION AND ORDER

On these facts, the Board concluded that all the issues raised by the Employer were or could have been litigated in the prior representation proceedings, and, accordingly, granted the motion for summary judgment. In reaching this decision, the Board rejected again the contention that the Employer was entitled to a hearing as to any of the issues raised, and noted also that the quorum requirement of the Act had not been violated by the Board in its disposition of the Employer's requests for review. (A. 188-190). Concluding that the Employer had not raised any issues that were properly litigable in this proceeding, the Board then found that the Employer's admitted refusal to bargain with the Union violated Section 8 (a)(5) and (1) of the Act (A. 191-194).

The Board's order requires the Company to cease and desist from the unfair labor practices found, to bargain with the Union upon request, and

to post appropriate notices (A. 194-196). In order to insure that the employees are accorded the services of their selected bargaining agent for the period provided by law, the Board construed the initial period of the Union's certification as beginning on the date the Company commences to bargain in good faith (A. 193).

ARGUMENT

THE BOARD DID NOT ABUSE ITS DISCRETION WHEN IT CERTIFIED THE UNION AND FOUND THAT THE EMPLOYER VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT.

A. Introduction

The Employer has admitted its refusal to bargain with the Union, which had been certified by the Board as the exclusive bargaining representative of the Mercy College employees in an appropriate unit. Accordingly, if the Board's certification of the Union is valid, the Company's admitted refusal to bargain violated Section 8(a)(5) and (1) of the Act. *Polymers, Inc. v. N.L.R.B.*, 414 F.2d 999, 1001 (C.A. 2, 1969), cert. denied, 396 U.S. 1010. See also *Magnesium Casting Co. v. N.L.R.B.*, 401 U.S. 137, 139, 141-142 (1971). In these circumstances, the sole issue presented is whether the Board has acted within the "wide degree of discretion" (*N.L.R.B. v. A. J. Tower Co.*, 329 U.S. 324, 330 (1946)) entrusted to it by Congress in resolving questions arising during the course of representation proceedings. As this Court has stated, "[t]he conduct of representation elections is the very archetype of a purely administrative function, with no *quasi* about it, concerning which courts should not interfere save for the most glaring discrimination or abuse." *N.L.R.B. v. Olson Bodies, Inc.*, 420 F.2d 1187, 1189 (C.A. 2, 1970), cert. denied, 401 U.S. 954.

B. The Board Did Not Abuse Its Discretion In Overruling
The Employer's Objections to the Election.

1. Neil Judge Was An Eligible Voter.

a. Judge was properly included in the unit.

The Employer has contended that Judge was ineligible to vote because he was allegedly excluded by agreement from the unit which includes "part time members of the faculty" and excludes "administrative personnel."⁸ The record shows, however, that on an annual basis Judge spent well over 50 percent of his time in non-administrative work, coaching and teaching (A. 129). Accordingly, the Board found that he was a "multi-function" employee, and the Board has long allowed such multi-function employees to be included in a bargaining unit if they share a sufficient community of interest in the conditions of employment to make their inclusion meaningful. *Berea Publishing Co.*, 140 NLRB 516, 519 (1963).

In university and college cases, when there has been a question as to the inclusion of multi-function employees in the same professional unit as the faculty, the Board has looked at the amount of time spent in similar functions to determine whether there was such a community of interest.

⁸ Judge's letter of appointment and his listing in the college catalogues refer to him as an administrator, but it is well established that the status of an employee under the Act is determined by the individual's actual duties, not by title or job classification. See, e.g., *Red Star Express Lines v. N.L.R.B.*, 196 F.2d 78, 80 (C.A. 2, 1952). Judge's duties are discussed, *infra*, pp. 14, 16-17, 19-20. Moreover, the Regional Director noted numerous "ambiguities" in the catalogue listings. Irving Koslowe, for example, was listed only in the administrative section; yet he was on the eligibility list prepared by the Employer and voted without challenge. In addition, both department chairmen and deans were listed under both faculties, administration and teaching, but the former were eligible to vote, while the latter were not. (A. 130-131.)

E.g., *Adelphi University*, 195 NLRB 639, 640, 644-645 (1972). Employees have been found to possess a sufficient community of interest with the faculty, when their work furthered the educational goals of the university. *New York University*, 205 NLRB 4, 8 (1973). Even non-teaching coaches have been included in faculty units, because the Board has recognized that their coaching function is closely related to teaching: they engage in substantial part in teaching physical and mental skills, utilizing educationally acquired knowledge of their specialty. *Manhattan College*, 195 NLRB 65, 66 (1972).⁹ Cf. *Florida Southern College*, 196 NLRB 888, 889-890 (1972) (athletic director included in the faculty unit).

It is clear from the record here that Judge's work as a multi-function employee warranted the same conclusion. With a bachelor's degree in physical education, he coached both intramural and intercollegiate sports, including soccer, basketball and baseball (A. 127-128). At the same time, he also taught six credit hours during the school year (A. 127, 129),¹⁰ and when his conventional teaching is combined with his coaching, it is evident that he spent the majority of his time using his professional qualifications in work functions closely related to those of the faculty. Sharing the interests of the faculty, as he did, he was properly included in the bargaining unit.

⁹ The Board noted in *Manhattan College* that "[t]he fact that their activities relate to an extracurricular matter, while perhaps of some importance to the students, is less significant in classifying the nature of their work." 195 NLRB at 66.

¹⁰ The investigation of the Regional Director showed that during the 1972-1973 academic year Judge taught 8 hours in the fall semester and 6 hours during the spring, although he did so without a supplemental teaching contract. In 1973-1974, Judge had a supplemental contract (in letter form) to teach 3 hours per semester, but he actually taught 6 credit hours. (A. 127.)

- b. The Board properly found that Judge
was not a supervisor.

The Employer has also contended that Judge should be excluded from the bargaining unit because he is a supervisor, having authority of the type described in Section 2(11) of the Act;¹¹ but the Employer's burden is a heavy one, for interpretation of this statutory term calls into play the Board's "special function of applying the general provisions of the Act to the complexities of industrial life." *N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). Courts owe "the usual deference to Board expertise in applying statutory terms to particular facts" (*Hanna Mining Co. v. Marine Engineers*, 382 U.S. 181, 190 (1965)), especially Section 2(11), since there exist gradations of authority "so infinite and subtle that of necessity a large measure of informed discretion is involved in the exercise by the Board of its primary function to determine those who as a practical matter fall within the statutory definition of a 'supervisor'." *Marine Engineers v. Interlake Steamship Co.*, 370 U.S. 173, 179, n. 6 (1962). quoting from *N.L.R.B. v. Swift and Co.*, 292 F.2d 561, 563 (C.A. 1, 1961). Accord: *Amalgamated Local Union 355 v. N.L.R.B.*, 481 F.2d 996, 1000 (C.A. 2, 1973), cert. denied, 414 U.S. 1062; *N.L.R.B. v. International Metal Specialties, Inc.*, 433 F.2d 870, 872 (C.A. 2, 1970), cert. denied, 402 U.S. 907.

¹¹ Section 2(11) of the Act reads as follows:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Exercising this informed discretion, the Board has held, with court approval, that the benefits of employee status will not be denied just because an individual, who spends the major part of his time in non-supervisory work, does have some supervisory responsibility. *Westinghouse Electric Corporation v. N.L.R.B.*, 424 F.2d 1151, 1157-1158 (C.A. 7, 1970), cert. denied, 400 U.S. 831, aff'g 163 NLRB 723 (1967).¹² Thus, the Board has held that a professional employee is not a supervisor within the meaning of the act, where the individual only supervised non-unit employees and did so less than 50 percent of the time. *Fordham University*, 214 NLRB No. 137, 87 LRRM 1643 (1974); *New York University*, *supra*, 205 NLRB at 8; *Adelphi University*, *supra*, 195 NLRB at 644.¹³

The record shows Judge exercised no responsible authority over unit personnel and his supervision of non-unit employees took up well below 50 percent of his working time (A. 129-130). The Employer argued that Judge exercised supervisory authority over the tennis coach, Ronald Reh-buhn; the women's basketball coach, John McMahon; and an assistant basketball coach. However, the Regional Director's investigation established

¹² The court held that "the Board has a duty to employees to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the Act is intended to protect" (424 F.2d at 1158), and it is settled that the exercise of some supervisory tasks in a merely "routine" "clerical," "perfunctory," or "sporadic" manner does not elevate a rank-and-file employee into the supervisory ranks. *Precision Fabricators, Inc. v. N.L.R.B.*, 204 F.2d 567, 569 (C.A. 2, 1953); *N.L.R.B. v. Swift & Co.*, 240 F.2d 65 (C.A. 9, 1957); *Dubin-Haskell Lining Corp. v. N.L.R.B.*, 375 F.2d 568, 570 (C.A. 4, 1967), cert. denied 393 U.S. 824; *N.L.R.B. v. City Yellow Cab Co.*, 344 F.2d 575, 579-582 (C.A. 6, 1965).

¹³ Explaining the rationale for this view, the Board has noted that "(n)o danger of conflict of interest within the unit is presented, nor does the infrequent exercise of supervisory authority so ally an employee with management as to create a more generalized conflict of the type envisioned by Congress in adopting Section 2(11) of the Act." 195 NLRB at 644.

that at no time did Judge exercise any responsible authority over Rehbn (A. 129). Rehbn, a faculty member, had not been hired by Judge, who first learned of the appointment from his own superior, Dean Hughes. Moreover, Rehbn received no compensation for his coaching work, and Judge's control of the tennis program was minimal. (A. 128, 129.)¹⁴ With regard to McMahon and the assistant basketball coach, both of whom were students at the college and non-unit personnel, Judge did exercise some supervisory authority, but the Employer introduced no evidence to challenge the finding that his supervisory responsibility took up well below 50 percent of his working time. (A. 129-130).¹⁵ Accordingly, then, the Board properly concluded that Judge's limited supervisory responsibility would not bar him from the exercise of his employee rights under the Act.

c. Judge was not a managerial employee.

In *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267 (1974), aff'g in part 475 F.2d 485 (C.A. 2, 1973), the Supreme Court affirmed the holding of this Court that Congress did not intend the exclusion of managerial employees to be limited to those in position susceptible to conflicts of interest in labor relations but rather that the exclusion embraced all

¹⁴ In view of the voluntary nature of Rehbn's work as tennis coach, without compensation, there is some question as to whether he would even qualify as an "employee" under the Act but the Regional Director made no finding on this point (A. 129, n. 37).

¹⁵ While McMahon did receive compensation, the assistant basketball coach was unpaid, and, thus, there is again the unresolved question as to whether he is even an employee within the meaning of the act (A. 130, n. 38). As to the exercise of supervisory authority over student employees, see also *New York University, supra*, 205 NLRB at 9, where the Board found such authority would not exclude an individual from the bargaining unit.

managerial employees. 416 U.S. at 274-275.¹⁶ The Court approved, however, the Board's definition of managerial employees as those who formulate and effectuate management policies by making operative the decisions of their employer. 416 U.S. at 288-290. The Court noted further that "the question whether particular employees are 'managerial' must be answered in terms of the employees' actual job responsibilities, authority, and relationship to management." 416 U.S. at 290, n. 19.¹⁷

The Employer sought reconsideration of the Board's decision in light of the *Bell Aerospace* holding, but the Board properly denied this request because the Supreme Court's decision did not raise any issues that had not been previously considered by the Board (A. 134). Prior to *Bell Aerospace*, the Board, in some cases, had attempted to establish a more limited definition of managerial employees based on the conflict of interest test, but, in evaluating the status of professional employees at institutions of higher learning, the Board had consistently relied on the other criteria cited with approval by the Court. See *New York University*, *supra*, 205 NLRB 5; *Tusculum College*, 199 NLRB 28-30 (1972); *Adelphi University*, *supra*, 195 NLRB at 648; *Fordham University*, 193 NLRB 134, 135 (1971); *C.W. Post Center of Long Island University*, 189 NLRB 904, 905 (1971).

¹⁶ In *Bell Aerospace*, the Supreme Court held that the conflict of interest test is not controlling in the determination of managerial status; however, to the extent that it is still applicable, it also does not bar Judge's inclusion in the unit as an eligible voter. Contrary to the employer's contention (A. 177-178), there is no conflict of interest here, for the Board found that Judge spent well over 50% of his time in nonsupervisory work. In light of this finding there was no need for the Board to reconsider the conflict of interest issue. See p. 16, *supra*, n. 13.

¹⁷ In this regard, the Court (416 U.S. at 290, n. 19) also stated that the specific job title of employees is not controlling, and cited with approval the reasoning of *Eastern Camera and Photo Corp.*, 140 NLRB 569, 571 (1963), that "the determination of an employee's managerial status depends upon the extent of his discretion, although even the authority to exercise considerable discretion does not render an employee managerial where his discretion must conform to the employer's established policy."

Evaluating the status of the professional employees in these cases, the Board noted that the peculiar authority structures of educational institutions are unlike the traditional organizations of the commercial world. Thus, the participation of these employees in decisions affecting the operations of their institutions does not give them managerial status because the existing institutional hierarchy traditionally rests ultimate authority with the university president and Board of trustees, and faculty decisions are of limited impact. Moreover, faculty members are unlike managerial employees in that they do not advocate the interests of management or act as management's representative in making their decisions. See *Tusculum College*, *supra*, 199 NLRB at 30; *Adelphi University*, *supra*, 195 NLRB at 648. In *N.L.R.B. v. Wentworth Institute*, 515 F.2d 550 (C.A. 1, 1975), the court affirmed the Board's finding that the professional employees involved were not managerial employees, although through normal faculty participation they were making decisions that affected the operations of the institution. In *Wentworth* the record showed that these employees did not possess substantive authority, and there was no evidence that they had a significant impact on policy or managerial matters other than the scheduling of exams, classes, and other such routine matters 515 F.2d at 557.

The record in the present case warrants the same conclusion. Judge's work was like that of the other professional unit members, and the Employer failed to introduce any evidence that Judge had responsibility over matters of substance. As director of athletics, Judge was responsible only for such routine matters as scheduling sporting events, preparing the department's budget, and procuring athletic equipment with the budget assigned to him (A. 128). Most of his time was spent teaching and coaching. There was no evidence that he was entrusted with any significant managerial functions, that he exercised executive authority, that he shaped

college policy, or that he advocated management interests in making his decisions. Indeed, working within the traditional college hierarchy, he acted with limited discretion and conformed to the college's established policy: he had to report his activities and submit his budget to the Dean of Student Services (A. 93). Thus, the record as a whole supports the Board's rejection of the claim that Judge was a managerial employee.

**2. The Union Handbill Did Not Contain
a Material Misrepresentation of Fact.**

The Employer's objections to conduct affecting the election alleged that the Union's pre-election pamphlet (A. 75-76.) contained a material misrepresentation of the 1968 report of the Middle States accrediting agency, a misrepresentation so substantial as to warrant setting aside the election. In considering such contentions the Board has been entrusted with broad discretion in determining the nature and extent of pre-election propaganda that will be allowed (e.g., *Henderson Trumbull Supply Corp. v. N.L.R.B.*, 501 F.2d 1224, 1228 (C.A. 2, 1974)), and in exercising this discretion, the Board is reluctant to set aside elections because of untruthful campaign statements of far greater magnitude than that alleged here. See *Linn v. United Plant Guard Workers*, 383 U.S. 53, 60-61 (1966), quoting from *Stewart-Warner Corp.*, 102 NLRB 1153, 1158 (1953). Thus, the Board will only set aside an election when there has been a misrepresentation of fact which involves a substantial departure from the truth and which may reasonably be expected to have a significant impact on the election. *Hollywood Ceramics Co.*, 140 NLRB 221, 224 (1962).¹⁸ In applying this policy, the Board has emphasized

¹⁸ Where, as here, there is no substantial inaccuracy, the Board has to proceed no further: even when a misrepresentation constitutes a substantial inaccuracy rather than a "minor distortion," the Board may properly conclude that the surrounding

(continued)

that exaggerations, ambiguities, half-truths and other minor distortions will not suffice to set aside an election. *Id.* at 224, n. 6. The Board does not insist upon "improbable purity of word or deed" in the election campaign, and applies its standard with "administrative caution," because of the ease with which any self-interested election loser can seize upon something in a heated campaign as an alleged departure from truth that will obstruct or delay the election process and divert the resources of the Board from more important matters. *Modine Manufacturing Co.*, 203 NLRB 527, 529-530 (1973), *aff'd*, 500 F.2d 914 (C.A. 8, 1974). As noted *supra*, pp. 6-7, the Employer argued that the Union's reference to the agency report was misleading because the main thrust of the Middle States report had been to praise the faculty's involvement in shaping the educational program at the college. While the Employer admitted that Middle States had cautioned about the development of an administrative autocracy, it contended that this was merely an "afterthought," and that therefore the Union's reference to the accreditation report's warning was a material misrepresentation of the fact (A. 121). The Regional Director acted in accord with the Board's policy in rejecting this claim. After carefully reading and comparing the relevant portions of the Union pamphlet

18 (continued)

circumstances precluded an impact significant enough to warrant setting aside the election. In the *Hollywood Ceramics* case, the Board laid down the four factors to be considered in measuring this impact: (1) the material nature of the fact misrepresented; (2) the other party's lack of time to respond; (3) the special knowledge and position of the party who made the statement; and (4) the employees' lack of independent knowledge with which to evaluate the statement. 140 NLRB at 223-224. This approach was endorsed by this Court in *Bausch & Lomb Incorporated v. N.L.R.B.*, 451 F.2d 873, 876 (C.A. 2, 1971). Although the Employer had no opportunity to reply here, the Union was made up entirely of faculty members, who had no claim to special knowledge; moreover the report itself was available to all at the office of the Dean of Academic Affairs (A. 89). See Supplemental Decision of Regional Director (A. 121, 122, n. 28).

and the Middle States report, he concluded that, despite any inaccuracy in quoting the exact words of the report, the handbill did not "constitute a departure from the truth" (A. 121). Reference to the full report made it clear to the Regional Director that, prior to and following the favorable comments in the report, concern was expressed by the accrediting agency over the extent of faculty participation in administration (A. 121). "It was hardly an afterthought," he concluded (*ibid.*), and thus he found no material misrepresentation of fact. At worst, he added, the Union "may possibly be charged with asserting a half-truth," but citing the *Hollywood Ceramics* case (*supra*) he properly rejected the contention that the handbill's content warranted setting aside the election (A. 122).

3. The Union's Name Was Not Incorrect Or Misleading.

As noted *supra*, pp. 3-4, the Employer objected to the Union's name, but after a full hearing on this issue prior to the election, the Acting Regional Director found that the Union's name was not incorrect or misleading (A. 64), and his finding is amply supported by the uncontroverted testimony of the Union president. The Union had been independently formed and was using the same name by which it had always been known (A. 64-65; 10-12, 53-54). There was no reason to require it to add to its name a reference to a potential affiliation with another labor organization. As Dr. Grow testified, the possibility of affiliation had been openly discussed, but the Union had made no application for an affiliation with NYSUT or any other group. There was no intention to affiliate with NYSUT: no application was actually "pending" and the Union remained unaffiliated. (A. 14; 19-20, 44, 50).

To support its claim, the Employer relied heavily on an earlier petition for certification (A. 58), which had been filed for the Union by the

NYSUT agent, with an "affiliation pending" designation. This petition was, however, withdrawn, and, as Dr. Grow testified, this assistance from NYSUT agent Koozman had been sought because the faculty council believed that the petition had to be filed by an official representative (A. 18-19). Moreover, as she also explained in a May 1 memorandum to the faculty after the original petition had been filed, the faculty council had made no affiliation with any group, and had no commitment to NYSUT (A. 59-60). The "affiliation pending" designation on the first petition had been used only to identify Koozman and provide a mailing address. Koozman had not been instructed to file the petition in this way, and the Union agreed to the designation with the understanding that it would have no binding effect and was merely necessary to identify him. (A. 18-21, 23, 36-37, 44.) Thus, there was no confusion here and no need to set aside the election. Cf. *N.L.R.B. v. Mattison Machine Works*, 365 U.S. 123 (1961).

The Act "establishes a strong public policy favoring the free choice of a bargaining agent by employees which should not be lightly frustrated." *Schmerler Ford Inc. v. N.L.R.B.*, 424 F.2d 1335, 1339 (C.A. 7, 1970). In recognition of this policy, the Board has historically been loathe to withhold its representation processes from petitioners meeting the broad statutory definition of a labor organization and indicating a willingness to represent the employees in the bargaining unit sought.¹⁹ Therefore, attacks on a petitioning union's leadership, or organizational practices, as well as allegations that the union intended to turn over its bargaining

¹⁹ Section 2(5) of the Act defines a labor organization as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

responsibilities to a different union, have all consistently been treated as too remote and speculative to warrant a prior restraint on the employees' choice. See, for example, *Alto Plastics Manufacturing Corp.*, 136 NLRB 850 (1962); *William Burns Int'l Detective Agency*, 138 NLRB 449, 451 (1962); *Guardian Container Co.*, 174 NLRB 34 (1969); *Minneapolis Knitting Works*, 84 NLRB 826, 828 (1949). While the Board does recognize an obligation to insure that a particular name used by a union does not confuse employees in their choice of a bargaining representative (e.g., *Radio Corporation of America*, 89 NLRB 699, 701-702 (1950)), it allows unions considerable leeway in choosing the name by which they designate themselves, for "it is presupposed that the employees will intelligently exercise their right to select their bargaining representative." *William Burns Int'l Detective Agency*, *supra*, 138 NLRB at 451.

Before the Board, the Employer asserted that the name is material because allegedly the Union is a "front" for NYSUT (A. 31-32). "Fronting" is a concern for the Board, however, only where the union seeking certification is closely linked to another labor organization that would not be qualified to represent the unit.²⁰ See, for example, *Minneapolis Knitting Works*, *supra*, 84 NLRB at 828. The qualifications of NYSUT have not been put in issue here, and so far as appears, either organization is qualified to represent these employees. Moreover, this concern is "prema-
ture and inappropriate," because the Board has provided adequate procedures to police its certifications and to test the propriety of such affiliations. *Guardian Container Co.*, *supra*, 174 NLRB at 34; *Butler Manufacturing*

²⁰ This concern arises in conflict of interest situations. See, e.g., *Bambury Fashions*, 179 NLRB 447 (1969). "Fronting" is also a concern in cases involving units of guard employees under Section 9(b)(3) of the Act. See, e.g., *International Harvester Co.*, *Wisconsin Steel Works*, 145 NLRB 1747 (1964).

Co., 167 NLRB 308 (1967); *Allis Chalmers Manufacturing Co.*, 62 NLRB 995, 996 (1945) ("Any question that may arise as to a change in the affiliation or identity of the certified organization, requiring amendment of the certification, must be raised in appropriate supplemental proceedings"). See Board Rules and Regulations, Series 8, as amended, (29 C.F.R.) Section 102.60(b) and 102.61 (d)(e).

C. The Employer Was Not Denied Procedural Due Process.

1. The Board's Rulings In the Representation Proceeding Did Not Violate the Quorum Requirement of the Act.

In accordance with Section 3(b) of the Act and the holding of this Court in *KFC National Management Corporation v. N.L.R.B.*, *supra*, (497 F.2d 298), a request for review must be considered by a panel of three Board members. The Employer has alleged as an affirmative defense in this case that the Board failed to comply with this requirement when it denied the Employer's requests for review of the Acting Regional Director's Decision and Direction of Election, and of the Regional Director's Supplemental Decision. (See pp. 4, 8-9, *supra*.) The record shows, however, that this claim is completely without merit.

The Employer raised this issue in its letters of January 13, ~~and~~ ^{and March 14,} February 11, 1975, in conjunction with its requests for certain Board documents pursuant to the Freedom of Information Act. (A. 153-154, 157-158, 159-160). On February 3 and March 14, 1975, the Executive Secretary of the Board advised the Employer by letter that there had been no violation of the Act's quorum requirement with regard to the Board's denial of review of the Regional Director's Supplemental Decision on all but one of its objections, or the denial of its request for reconsideration of that decision (A. 155, 161). The Executive Secretary's letter of March

14 further noted, however, that, with regard to the Board's original denial of review of the acting Regional Director's Decision and Direction of Election, there may have been a procedural infirmity and that, since the Board's records did not affirmatively establish whether a full quorum had ratified the decision, a duly constituted panel of the Board had again considered and denied the request, "*nunc pro tunc*" on March 12, 1975 (A. 161-162.)

Moreover, to show that the Board had, indeed, complied with the quorum requirement in rejecting the Employer's representation objections, the Executive Secretary enclosed in his March 14 letter several pertinent documents requested by the Employer. The Employer was given a docket card maintained by the Office of Representation Appeals, which showed the record vote as to the decision of March 12, 1975, with notation of the participating members, as well as a file copy of the telegraphic order, which also indicated the names of the Board members participating in the decision (A. 163-164). Subsequently, on May 2, 1975, Board Chairman Murphy sent the Employer another letter, containing a docket card and file copies of the telegraphic orders of April 30 and May 13, 1974, confirming the Board's compliance with the quorum requirement as to the denial of the request for review of the Supplemental Decision and as to the Board's refusal to reconsider that denial (A. 169-172).

2. The Board Properly Overruled the Employer's Post-Election Objections Without a Hearing.

Although Section 9(c) of the Act requires that a pre-election hearing be held to determine whether a question concerning representation exists, there is no statutory provision for post-election hearings. Under the Board's rules, objections to an election are often resolved on the basis of an administrative investigation, and a hearing on such objections is only required if they give rise to "substantial and material factual issues." Board Rules

and Regulations, Series 8, as amended, (29 C.F.R.) Section 102.69 (1975). It is clear that this qualified right to a hearing satisfies all statutory and constitutional requirements and the Board's rule has long been recognized by this Court to be "not only proper but necessary to prevent dilatory tactics by employers or unions disappointed in election returns." *N.L.R.B. v. Joclin Mfg. Co.*, 314 F.2d 627, 631-632 (C.A. 2, 1963). Accordingly, a hearing is not required "unless by *prima facie* evidence the moving party presents substantial and material factual issues which, if resolved in its favor, would warrant setting aside the election." *Polymers, Inc. v. N.L.R.B.*, *supra*, 414 F.2d at 1004-1005. It is not enough for an objecting party to present conclusory allegations based on undisputed facts and questions regarding ultimate determinations by the Regional Director. *Id.* at 1005. See also *Lipman Motors, Inc. v. N.L.R.B.*, 451 F.2d 823, 827 (C.A. 2, 1971).

In the present case, the Employer was afforded a full opportunity to present evidence to the Regional Director during the course of his investigation (A. 100). Thereafter, the Employer also had an ample opportunity to seek Board review of its post-election objections and to challenge the Regional Director's Supplemental Decision, but no substantial and material factual issues were raised in the Employer's request for review. Despite the Employer's repeated contention, the affidavits of Grunewald and McCarthy, which had been submitted to the Regional Director by the Employer, did not give rise to a sharp credibility issue:²¹ no hearing was

²¹ See the Employer's Answer to the Board's Application for Enforcement, page 2. The affidavit of Walter McCarthy, Treasurer of the College, described the responsibilities and work of Neil Judge (A. 93-95). That of Donald Grunewald, President of the College, described in part, the circumstances attendant to the distribution of the Union's handbill (A. 88-89). However, the relevant factual contentions contained in these affidavits were not disputed by the Regional Director. At issue were the legal conclusions to be drawn from these facts as to the voting eligibility of Judge and the Union's alleged misrepresentation.

necessary, for the Regional Director's decision turned on the application of Board expertise to largely undisputed facts.²² *N.L.R.B. v. Olson Bodies, Inc.*, *supra*, 420 F.2d at 1190. The Board properly rejected the Employer's post-election objections without a hearing, for the request for review was based on mere disagreement with the legal conclusions and reasoning of the Regional Director. See *Polymers, Inc. v. N.L.R.B.*, *supra*, 414 F.2d at 1005. Accord: *N.L.R.B. v. Modine Mfg. Co.*, 500 F.2d 914, 916 (C.A. 8, 1974); *N.L.R.B. v. Tennessee Packers, Inc.*, 379 F.2d 172, 178 (C.A. 6, 1967), cert. denied, 389 U.S. 958.

3. The Board Properly Granted the Motion for Summary Judgment and Denied the Employer's Motion for Reconsideration.

In the absence of special circumstances — for example, newly discovered or previously unavailable evidence — it is well settled that a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in the prior representation proceeding. *Magnesium Casting Co. v. N.L.R.B.*, *supra*, 401 U.S. at 141 (1971); *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 161-162 (1941); *N.L.R.B. v. Horn & Hardart Co.*, 439 F.2d 674, 683 (C.A. 2, 1971).²³ “The purpose of the Board's rule in this regard is to

²² The Employer also argued that the closeness of this election required the Board to grant a hearing on its post-election objections (A. 178-179, 200). However, while the closeness of an election may play a part in assessing the effect of a misrepresentation upon the results of an election, where the alleged misrepresentation lacks substantiality, mere closeness is insufficient to require consideration of the objection, much less warrant a hearing on the issue. See *N.L.R.B. v. Southern Health Corp.*, 514 F.2d 1121, 1125-1126 (C.A. 7, 1975); *N.L.R.B. v. Visual Educom, Inc.*, 486 F.2d 639, 643 (C.A. 7, 1973); *N.L.R.B. v. O.S. Walker, Co., Inc.*, 469 F.2d 813 (C.A. 1, 1972).

²³ See Board Rules and Regulations, Series 8, as amended (29 C.F.R.) Section 102.67(f) and 102.69(c).

bring all the evidence out at the start of the proceedings so that the employer cannot withhold facts for the purpose of delay." *Pepsi-Cola Bottling Co. v. N.L.R.B.*, 409 F.2d 676, 681 (C.A. 2, 1969), cert. denied, 396 U.S. 904 (1969). Here, the Employer's answer and its response to the motion for summary judgment admitted the refusal to bargain, but interposed only "defenses" that previously had been raised or litigated in the underlying representation proceeding, or had previously been considered and resolved by the Board (A. 189).

Thereafter, the Board's Decision and Order were issued on July 11, 1975, and, subsequently, on September 11, 1975, the Employer made a motion for reconsideration of the Board's decision (A. 198-201). However, the Employer's motion failed to meet the 20-day filing requirement of Section 102.48(d) of the Board's Rules and Regulations, and the Board did not abuse its discretion in denying as "untimely" this motion, despite the Employer's second request for reconsideration (A. 202, 205). See *N.L.R.B. v. Yale Mfg. Co.*, 356 F.2d 69, 71 (C.A. 1, 1966); *Metal Blast Inc. v. N.L.R.B.*, 324 F.2d 602, 604 (C.A. 6, 1963).

Indeed, untimely or not, the Employer's motion was properly denied consideration by the Board because the contentions raised by the Employer were objectionable on other grounds. The Employer requested a new election in light of the "serious legal questions" allegedly arising out of the original election and the "expansion and turnover of the unit" (A. 198). It alleged that three extension centers had opened between September 1974, and September 1975, that the unit had expanded by about 60 percent and that only 59 of the original 85 eligible voters remained at the College (A. 199, 200, 204.) It also alleged that the character of the unit had changed because of an increase in part-time faculty (A. 200).

These contentions must fail for a variety of reasons. The asserted "change" first occurred in September 1974, a year before the Company

tendered this evidence, and Board Rules and Regulations, Series 8 (29 C.F.R.), Section 102.48(d)(2) provides that a "motion for leave to adduce additional evidence shall be filed promptly on discovery of such evidence." Moreover, insofar as the Employer seeks a second election on the basis of changes in the unit while the Employer was litigating its bargaining obligation on the basis of the issues treated *supra*, pp. 13-25, this Court observed in *N.L.R.B. v. Patent Trader, Inc.*, 426 F.2d 791, 792 (1970):

Requiring still another Board election in such a situation undermines the central purpose of the National Labor Relations Act, since it gives an employer an incentive to disregard its duty to bargain in the hope that over a period of time a union will lose its majority status.

Thus, where the union is certified and the employer has never honored a certification which this argument concedes was a valid one, neither the passage of time, nor the turnover which almost inevitably accompanies it, warrants withholding a bargaining order.²⁴ *N.L.R.B. v. Katz*, 369 U.S. 736, 748 n. 16 (1962); *Franks Bros. v. N.L.R.B.*, 321 U.S. 702, 704-705 (1944); *N.L.R.B. v. P. Lorillard Co.*, 314 U.S. 512, 513 (1942).²⁵

Turnover aside, unit expansion is material only if the employee complement of the unit in which the election is held was not "representative

²⁴ It should be noted that the Board has long held that new employees will be presumed to support a union in the same ratio as those they replace. *Massey-Ferguson, Inc.*, 184 NLRB 640, 644 (1970), enforced, *per curiam*, 78 LRRM 2289 (C.A. 7, 1971).

²⁵ In *KFC National Management Co.*, 214 NLRB No. 29, 87 LRRM 1685, 1687-1688 (1974), enforced summarily by this Court on August 1, 1975, the Board rejected such a request for a new election when it was claimed that less than 1/3 of the employees eligible to vote in the election were currently employed and the remaining employees did not want the union to represent them.

and substantial," as compared with the complement of the unit in which bargaining is required. *Renmuth, Inc.*, 195 NLRB 325, 326 (1972), enf'd, 470 F.2d 997 (C.A. 6, 1972); *Clement-Blythe Companies*, 182 NLRB 502 (1970), enforced *per curiam*, 77 LRRM 2373 (C.A. 4, 1971). Neither a 60 percent increase in unit size nor the increase in the proportion of part-time faculty in a unit which already included a substantial number of part-time members warrants the Employer's refusal to honor the certification. Cf. *N.L.R.B. v. Broyhill Co.*, F.2d (C.A. 8, 75-1260, January 2, 1975, 91 LRRM 2109, 2111). This increase is even less significant in that it occurred over an extended period of more than two years during which, but for the Employer's unlawful refusal to bargain, any appropriate accommodation to changes in unit work would have been treated as a mandatory subject of bargaining. Cf. *N.L.R.B. v. Katz, supra*, 369 U.S. at 742-743.

CONCLUSION

For the reasons stated above, it is respectfully submitted that a judgment should be entered enforcing the Board's order in full.

ELLIOTT MOORE,
Deputy Associate General Counsel,
 DAVID F. ZORENSKY,
Attorney,

National Labor Relations Board.
 Washington, D.C. 20570

JOHN S. IRVING,
General Counsel,
National Labor Relations Board.

January 1976.

UNITED STATES COURT OF APPEALS

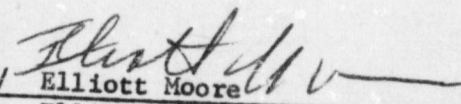
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,)	
)	
Petitioner,)	
)	
v.)	No. 75-4232
)	
MERCY COLLEGE,)	
)	
Respondent.)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

Mercy College
Att: Dr. Donald Gruenwald
555 Broadway
Dobbs Ferry, New York 10522


/s/ Elliott Moore
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.
this 30th day of January, 1976.